



FILED

DEC 10 1898

JAMES M. McKENNEY,
Clerk.

No. 112
Ordn. of Wilson v. Benedict for
Appellants

Supreme Court of the United States.
Filed Dec. 10, 1898.
October Term, 1898.

No. 112.

Charles G. Smith and Charles G. Smith, Jr., Appellants,

vs.

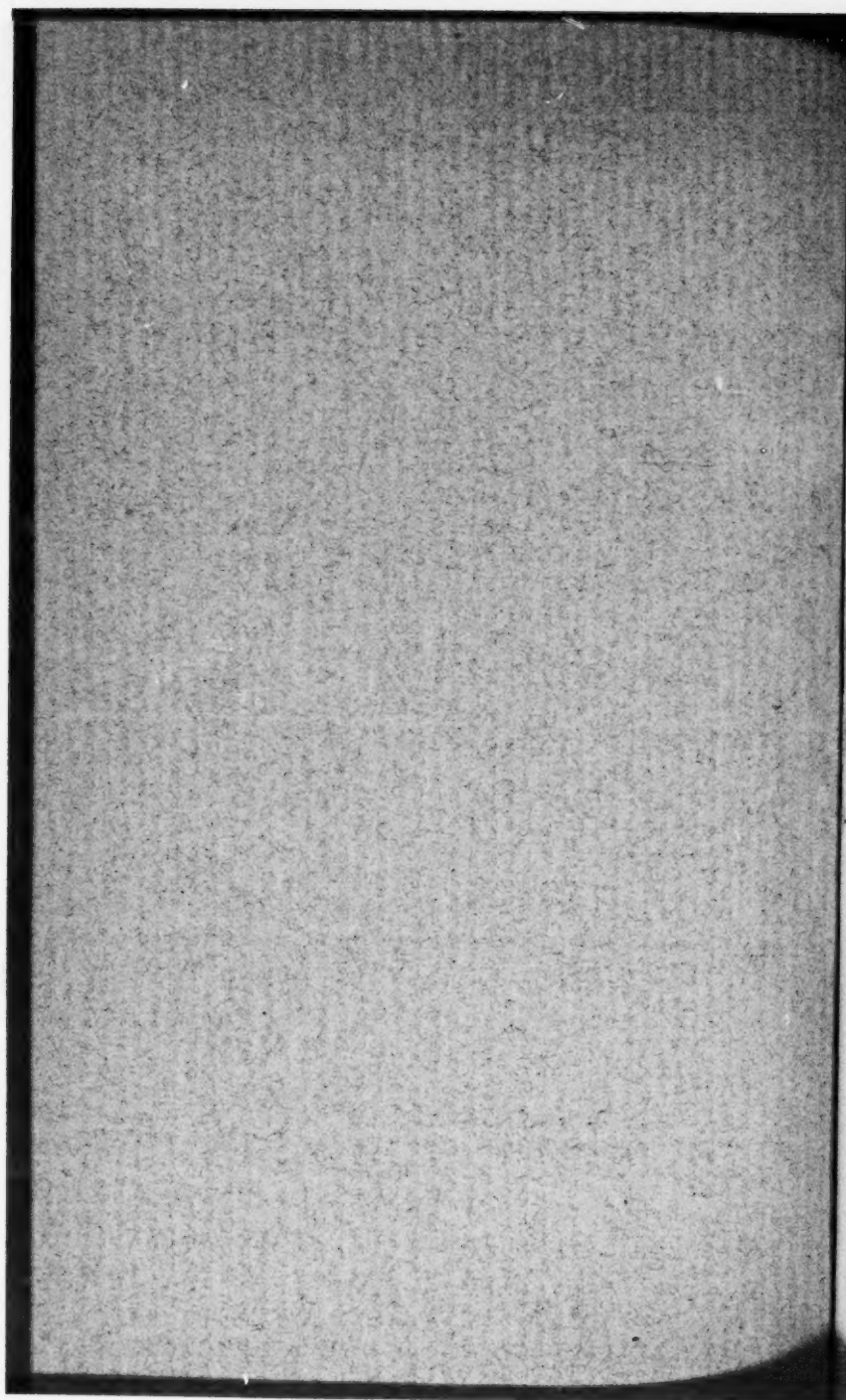
Charles Burnett, suing on his own behalf,
Charles Burnett and Charles G. Endicott, etc., et al.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND POINTS FOR APPELLANTS.

JAMES S. EDWARDS,
JOB BARNARD,
Proctors for Appellants.

NATHL. WILSON,
ROBERT D. BENEDICT,
of Counsel.



Supreme Court of the United States

CHARLES G. SMITH and CHARLES G. SMITH, Jr.,
Appellants,

v/s.

CHARLES BURNETT suing on his own behalf and said CHARLES
BURNETT and CHARLES G. ENDICOTT, Executors of HARRIET
E. BURNETT, deceased, and others.

POINTS FOR APPELLANTS

EDWARDS & BARNARD,
Proctors for Appellants.

NATHANIEL WILSON,
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NEW YORK:

C. H. JONES & CO., PRINTERS, 114 FULTON STREET.

1868



Supreme Court of the United States

CHARLES G. SMITH and CHARLES G.
SMITH, JR.,

Appellants,

vs.

Brief for
Appellants.

CHARLES BURNETT, suing on his own
behalf, and said CHARLES BURNETT
and CHARLES G. ENDICOTT, Execu-
tors of HARRIET E. BURNETT, De-
ceased, *et al.*

This is an appeal by the respondents from a decree of the Court of Appeals of the District of Columbia, affirming a decision of the Supreme Court of the District of Columbia, sitting in Admiralty, in favor of the libellants, against the respondents.

The libel was filed by the owners of the schooner *Ellen Tobin*, against the respondents, who were the owners of a wharf at Georgetown. It was brought to recover the damages occasioned to the schooner by reason of the fact that while lying abreast of the respondents' wharf, engaged in loading crushed stone, she settled upon a rock, which caused her to leak and sink. The occurrence took place in August, 1893.

Statement of Facts.

In order to save this Honorable Court the labor of an examination of this Record of over seven hundred pages, we have endeavored to bring together in this brief all the facts, and all the evidence bearing on those facts, which it will be important to consider. There were other questions involved in the case as to which masses of testimony were taken. For instance, the claim of the libellants being that there was a rock in the river, in front of the respondents' wharf, which was so near the surface of the water that the schooner, when only half loaded, settled at low tide upon that rock and was injured, the respondents denied that there was any rock so near the surface of the water as the libellants claimed; and they accounted for the settling of the schooner upon the rock by the allegation that the schooner was leaking, and was not pumped. This issue we have preferred to pass by, because there are, as it appears to us, controlling reasons which call for a reversal of this decree, even assuming that the rock in question was as high as the libellants have alleged.

A great deal of testimony was taken in attempting to fix with accuracy the locality and the description of the point of rock. This evidence also may be disregarded, because we will assume the rock to have been as the libellants claimed it.

So, also, great masses of testimony were taken as to the value of the vessel, and as to the expense of raising and what it would have cost to repair her. As to this question of amount, also, we do not deem it necessary to occupy the time or patience of the Court.

The respondents also filed a libel against the owners of the vessel, claiming damages by reason of improper delay, as they alleged, on the part of the owners of the vessel in removing her from the place where she was sunk. Large quantities of evidence were taken on this subject, which, also, need not be considered here, the court below having held that

the owners of the schooner were not liable for any damages. If, in case of a reversal, it should be held that the owners of the vessel were liable for damages, that question would have to be examined and passed upon independently.

As we have said, we propose now to bring together the statements of fact which are necessary for the considering of the questions which we propose to discuss in the case. We have numbered the various statements, placing under each of them the evidence by which it is sustained. As to those statements about which there is no dispute in the evidence, we have not felt it necessary to set forth all the evidence in full; but as to any of the statements in reference to which there are discrepancies in the evidence, we have endeavored to set forth all the evidence bearing upon each of them.

The facts of the case which it will be important to consider are as follows :

(1.) The appellants leased a wharf in Georgetown near 32d street, (Smith, fols. 513, 515), where they had carried on the business of crushing stone and shipping it for three years prior to this occurrence in August, 1893. The wharf was used only in connection with their own business, no wharfage being charged (fol. 519).

(2.) In August, 1893, an agreement was made through Mr. Lee, who was a broker, by the captain of the schooner "Ellen Tobin," to take a load of crushed stone for the appellants from their wharf to Fortress Monroe, at a freight of fifty cents a ton.

(Hankins, fols. 68, 69).

(3.) The "Ellen Tobin" was a three-masted schooner of 413 tons register. Her keel was straight and 125 feet long. She was 32 feet wide.

Libel, fol. 3: She is registered at 413.61 tons.

Endicott, fol. 363: "She had three masts."

Hankins, fol. 118: "The schooner was 32 feet wide. She was about 125 feet keel. * * * The keel was supposed to be straight the whole length of her."

(4.) She arrived in front of the appellant's wharf on Wednesday, August 2, 1893.

Libel, fols. 3 and 4.

Hankins, fol. 71.

(5.) On Thursday, August 3, they began loading her. The master took in at the after hatch on that day about 100 tons of stone.

Hankins, fol. 71: They went to work as soon as they got ready Thursday morning after we got in place dumping stone in the aft hatch. We arrived there Wednesday and this was Thursday. We worked all day in that hatch Thursday.

Speaker, fol. 659: "I don't believe I got in over 100 tons on Thursday, if I got in as much."

(6.) On Friday, August 4, they continued taking in stone at the after hatch till after 2 P. M., when the schooner was moved aft so as to receive stone into the forward hatch from an iron chute, having taken in at the after hatch 300 tons of stone in all.

Hankins, fol. 72: "About 3 o'clock on that afternoon—in the morning, Friday, I told the mate when she was low down to 13 feet—Friday morning I told him when she was loaded down to 13 feet aft to haul her back so they could work in the forward hatch. * * * I came down about 3 o'clock on board the vessel and the mate had just hauled her—just got her fast."

Twiford, fol. 235: "We resumed work Friday morning at 7 o'clock. We kept working till noon; then we knocked off till 1 o'clock, and then went to work till a few minutes after 2 and hauled the vessel astern, to enable us to work in the forward hatch."

Speaker, fol. 658: "I think I got in about 200 tons on Friday."

Fol. 677: "You said that on Thursday you put on board about 100 tons and on Friday about 200 tons—that made 300 tons; where was that put?"

A. "That was put in the after hatch."

(7.) After the schooner was moved aft, stone was put in at the forward hatch till about 5:15 P. M. on Saturday, when about 100 tons had been taken in at that hatch.

Hankins, fol. 73: "We worked on in the forward hatch all day Friday, loading stone, crushed stone, and still Saturday."

Id., fol. 74: "He worked until 15 minutes after five and quit."

Speaker, fol. 678: "And on Saturday you put on board about 100 tons?"

A. A little more than 100. That was put in the forward hatch."

This makes about 400 tons in all as alleged in the libel (fol. 4).

(8.) The draft of the vessel forward and aft at different times was as follows:

When she came to the dock, 7 ft. forward and 7 ft. 10 aft.

At 2:30 P. M. Friday, about 8 ft. 6 forward and 13 ft. aft.

At noon Saturday, 11 ft. 4 forward.

At 5:30 P. M. Saturday, 12 ft. 10 forward and about 10 ft. aft.

At 7 A. M. Sunday, 12 ft. 10 forward and about 10 ft. aft.

Hankins, fol. 93.:

"Q. When you got your vessel into her berth, how much water did she draw? A. She drew 2 inches less than 8 aft and about 7 feet forward. * * * I cannot say how much she drew at any time Thursday.

Fol. 94: "I don't know how much she drew Friday morning. * * * At half-past two on Friday she drew 13 feet aft and she was drawing about 8½ forward.

"I did not look Friday evening to see what she was drawing. She was coming up on an even keel.

"I don't know how much she drew Saturday morning."

Fol. 95: "At Saturday noon she was drawing about 11 feet 4 inches forward. I don't know exactly how much she was drawing aft.

"Saturday afternoon when we stopped work she was drawing 12 feet 10 inches forward ; aft she was drawing about 10 feet, 10 to 11 feet, 10 feet 10."

Fol. 96 : "On Sunday morning she was drawing the same as she did Saturday night. I did not measure. All you had to do was to look at the mark. I looked at the mark. It was the same forward. I didn't look aft Sunday morning."

Fol. 97 : "On Saturday afternoon, when we stopped, she had no water in her and she was lying, I should judge, from 20 to 24 inches by the head, low down by the head ; and she was drawing at that time 12 feet and 10 inches of water forward."

Fol. 75 : On Sunday morning "she was over 18 inches to two feet down by the head, I should judge. She was drawing 12 feet 10 inches of water forward."

Twiford, fol. 247 :

"Q. How much water did the schooner draw when you went home on Saturday afternoon?"
A. She was drawing 13 feet of water, aft, sir.

"Q. And how much forward? A. I guess she was drawing about $7\frac{1}{2}$ to 8 feet. I didn't notice forward. I know she was out of the water. She didn't draw as much as when she had nothing in her.

"Q. You didn't notice forward? A. No, sir.

"Q. Aft? A. Yes! I did aft. She was drawing 13 feet.

"Q. 13 feet aft and $7\frac{1}{2}$ feet forward? A. Yes, sir."

(*Saturday afternoon* in the above question was a mistake. Twiford went home on Friday (fol. 241). This was the draft of water on *Friday afternoon*.)

(9.) High water on Friday, August 4th, was at 12:32 M.

Low water on Saturday, August 5th, was at 7:47 A. M. and 7:55 P. M.

High water Saturday was about 1:07 A. M. and 1:28 P. M.

Low water on Sunday morning, August 6th, was about 7 or 8 A. M.

Hankins, fol. 106 : The tide was high Saturday night about 12 o'clock.

Lord, fol. 933 : It takes the tide 7 hours to run out and five to run up.

(See tide tables at fol. 832).

(10.) The rise and fall of the tide at this place is usually 3 or 4 feet, but it varies somewhat.

Lord, fol. 935 : On the Potomac River the tide ebbs and flows in 24 hours, and some $3\frac{1}{2}$ to 4 feet then. * * * The winds affect it, but on regular tides at regular weather and winds calm the tide comes tolerably regular about the same height.

Twiford, fol. 234 : I asked him how much the tide rose and fell, and he said from 3 to $3\frac{1}{2}$ feet.

(And see Lord, fol. 256).

(11.) When the vessel was moved aft the mate sounded, by order of the Captain, and found a little over 14 feet of water at the stern. It was then about one-third of the ebb, and the mate knew that the tide rose and fell three feet to three and a half.

Twiford, fol. 235 : On Friday afternoon we went to work till a few minutes after two and hauled the vessel astern.

Fol. 236. The Captain asked me to sound the depth of the water if we hauled astern. I did so. I found about $13\frac{1}{2}$ feet of water on the inshore quarter, and about half way between the davits and the rudder I sounded again and I found about $14\frac{1}{2}$ feet. Well, between 14 feet and a little over.

Fol. 244. I made the second sounding right over the taffrail and found 14 feet.

Hankins, fol. 72, 73 : The mate told me he had 13 feet of water. * * * I took the lead and sounded for myself.

(12.) The attention of the Master of the schooner was called on Saturday afternoon, when they stopped loading, to the position of the vessel, as

indicating that she was resting on something aft of amidships.

Libel, fol. 5. That on Saturday afternoon "said berth at said wharf did not contain a sufficient depth of water to even float said vessel in her then not much more than half-loaded condition, and when she was then not drawing more than 12 feet 10 inches at her deepest point, and that when said quantity of stone had been loaded on her as aforesaid it caused her to touch something, being such obstruction."

Barkley, fol. 47. Q Why did they pump forward? (on Saturday afternoon.)

A. Because she was down by the head.

Hankins, folio 73: Along about 5 o'clock I saw that the schooner was tipping to the head, or about 5 o'clock, between 4 and 5. I asked Mr. Speaker if she was not on something. I thought she seemed to tip too much. He told me no; that she was on nothing. He says forward of the piling, that fourth piling, where it had been dug out, you wouldn't touch there, if you were full loaded, on the lowest tides; just so you breast her off aft, so she don't come in aft there is nothing to hurt you. He said to me that he was going to knock off at five o'clock, that being Saturday, and she would not tip much more anyway, and Monday morning he would put another lighter inside of us.

Folio 97-98: On Saturday afternoon when we stopped, she was lying, I should judge, from 20 to 24 inches by the head, low down by the head, and she was drawing at that time 12 feet 10 inches of water forward, and Mr. Speaker and I was looking from the dock to see how much water she was drawing.

Q. Was she afloat then? A. I don't know whether she was when we knocked off or not.

Q. What is your best knowledge? A. I think she was not afloat; and I asked Mr. Speaker if she didn't touch something, and he said "No," and that was the reason I sounded after six o'clock, and after I sounded it convinced me she was afloat, because I didn't strike any shallower water than what floated her.

Q. Your own opinion was that she touched?
A. I thought so before I sounded.

Q. And you sounded carefully all around?
A. Yes sir.

Q. As carefully as anyone could do it? A.
Yes sir.

Q. And you found nothing to make you think she touched? A. No sir.

Folio 104: Q. What was there that called your attention to the condition of the vessel, that made you think she had touched? A. Because I thought she was tipped more in the head than she should have been.

Q. That is bow down? A. Yes sir; by the way the stone was going in.

Speaker, folio 601: I stopped loading on Saturday, about 15 or 20 minutes of five o'clock. The captain came onto the wharf, and I was out there; I believe he was out on the wharf when I went out on the wharf. He was standing at the bow of the vessel, standing forward there under the hoister. The captain says to me, he says, "I believe I am ebbing out a little bit." It was then about low tide.

Q. State right there what you mean by "ebbing out"? A. I don't know what he meant by "ebbing out,"—that we were discharging stone in there, and that he was not going down any more; I suppose that is what he meant by "ebbing out." I told him if that was the case we would stop work. He said that he didn't want to get her down by the head, because he was making a little water, and he didn't want to get away from the pumps. He said that if we continued on he believed she was ebbing out; that if we continued to discharge stone in there he would get her too far by the head and she would make a little water; and he didn't want to get her away from the pump. I told him in that case I would stop the machine, and not put any more in, which I did.

Folio 608: On Saturday afternoon did the captain ask you if she was not on something and did you say that she was on nothing? A. No sir, I never made any such answer as that.

Folio 652: Q. Did you and the captain on Saturday evening just before or when you quit work, look at the schooner's markings forward, and say that she was two feet down by the head, and was drawing 12 feet 10 inches of water forward? A. No sir.

Q. You didn't? A. No sir.

Q. You are certain of that? A. I am positive, sir. The captain called my attention to it, but not to the depth of the schooner.

Q. Did you not say that the schooner was drawing 12 feet 10 inches of water, forward? A. No sir, I didn't.

Q. You didn't say that? A. No sir, I didn't say that.

Q. Did you not on that Saturday evening just before you quit work, or just after you quit work, look at the schooner with the captain? A. The captain and I were standing right under the hoisters.

Q. Under what hoist, the east hoist? A. No, the west hoist.

Q. What happened there? A. The captain says to me, he says, "I believe that I am ebbing out a little," and he says, "I wouldn't like to put any more in forward; she's near about on a level keel now, and I wouldn't want to get her in down by the head; that the vessel is making some water, and I don't want it to get away from the pumps."

Folio 669: Q. Do you not say that you suggested to him that another lighter should go in there? A. He had talked of that, he and I together.

Q. And you had suggested it, you say, as I understand it? A. I might have suggested it; he might have suggested it; we were talking together.

Q. Why should you have suggested it? A. Well, to be on the safe side, to lay over Sunday.

Q. To be on the safe side of what, for fear of what? A. For fear?

Q. Yes? A. Well, he said he was ebbing out, and he thought he was aground.

Q. He said he was tipping by the head? A. No, sir; he said he was ebbing out.

Q. Did you not say that he was tipping by the head? A. No, sir; I didn't say that he was tipping by the head. I didn't see it until the captain called my attention to it; and I aint seen it yet, that she was ever tipping by the head.

Q. The captain did call your attention to it? A. He called my attention; he said he thought she was ebbing out.

Q. And said that he thought that she was down by the head? A. He said he didn't want to get her down by the head, that was the expression he made to me, that she was ebbing out, and he didn't want to get her down by the head.

Folio 671: Q. Now, tell us why the suggestion was made by either you or the captain about putting another vessel in there for Sunday? A. When he said that he was caught, probably the suggestion might have been made then. He said she was ebbing out, that is the way he expressed it. Of course he was caught if he was ebbing out. That is the way he expressed it. He said that he thought he was ebbing out, and he did not want to get by the head.

Q. What did you say to that, did you say that you thought he was on something or not? A. I don't know that I made any reply or not.

Q. Did you tell him that the vessel was all right? A. No, sir: I did not.

Q. Well, if he said you did, he is wrong about that, is he? A. Yes, sir.

Q. Dead wrong? A. He must be wrong about it.

(13) The vessel was not caused to leak by anything that happened on Saturday afternoon or evening, but began to leak about the hour of low tide on Sunday morning.

Barkley, fol. 47:

Q. How long was she pumped at 6 o'clock Saturday evening. A. Long enough to get 25 strokes out of her pump. I should judge.

Q. What happened then. A. Nothing happened then. She was all right then.

Hankins, fol. 74-5: The men all went home then, and we lay as we were after the men had swept; when Mr. Smith's men had all gone home, our men were sweeping the decks. After they got the decks swept up I told them to try the pump, which they did. They got out, I should judge, I didn't count them, about twenty-five strokes of water. We then got our supper, and there was nothing more done that night. Next morning we got our breakfast about seven o'clock. After we got our breakfast I told the men to try the pumps.

I was sitting right by the mizzen rigging, and they came out and caught the pumps and pumped about five minutes, I should think, and she didn't suck. I asked them if she didn't suck, and they said no, the men that was pumping. I told one of the men to run down on the stone in the fore hatch, and see if there was any water in her. He went down, and said there was some, and I said, how much? He took a rake handle that was in the hold, and went just forward of the foremast and stuck it down by the keelson, and showed me how much water there was on the rake handle, putting his thumb on the mark. There was about two feet, as near as I could tell.

Folio 86 :

Q. You said that after twenty-five strokes were given from the pumps it "sucked," what do you mean by that? A. It sucked air. You couldn't get any more water.

Q. What did that indicate? A. That there was no water in the hold of the vessel at that time.

Folio 97 :

Q. On Saturday afternoon when you stopped, what was the condition of the schooner? A. Her condition was good.

Folio 107 :

Q. During all of Saturday night you knew of nothing being wrong in the position of the vessel, or as to her condition? A. No, sir.

Q. When did you first suspect she was leaking? A. When we tried the pumps.

Q. What hour? A. Between half past 7 and 8. We had breakfast about 7, and we then tried the pumps.

Q. Between seven and eight? A. About half past seven, I should judge.

(14) The position of the vessel on Friday afternoon was a positive demonstration to the Master that she was, at that low tide, resting on something about amidships, which lifted her stern about two feet.

On Thursday they put in about 100 tons, and on Friday about 200 tons. That made 300 tons, that was put in the after hatch. (Speaker, fol. 678).

On Friday at 2:30 P. M., the vessel drew 13 feet aft and about 8 feet forward. (Hankins, fol. 94).

They stopped loading in the after hatch about 3 P. M. Friday, and hauled her aft and began loading in the forward hatch. (Twiford, fol. 235).

At about 5:15 P. M., on Saturday, they had put in the forward hatch a little more than 100 tons. (Speaker, fol. 678).

And then Hankins, her Master, saw that she was lying 20 to 24 inches by the head and that she was drawing 12 feet 10 inches forward and between 10 and 11 feet aft (Hankins, fol. 95, 96, 98).

Stephen W. Smith, libellants' witness (fol. 1000) testifies,

Q. Suppose a vessel, when fully loaded would take a cargo of 600 tons and would draw 14 feet 3 or 14 feet—that is at the deepest point when fully loaded—when such a vessel loaded with 300 tons in the aft hatch and 100 tons in the forward hatch, reasonably trimmed, and she was dipping by the head 18 or 24 inches, what would that indicate? A. *It would indicate she was on something abaft of amidships. A vessel with that quantity of cargo in her aft and that quantity forward, ought to be at least two feet at the stern if she was afloat.*

Q. Why would that be indicated? A. The weight of her cargo, 300 tons in her after hold and 100 tons in her forward hold certainly does not balance. She is bound to be by the stern, if she is afloat.

This evidence is not contradicted or criticised.

(15.) It was understood by the foreman of the wharfinger that the master of the schooner would move his vessel out from the dock at high tide on Saturday night; and, on Saturday afternoon, he made the arrangements necessary to enable the Master to do so.

But the Master did not move her.

Barton, 616.

Taylor, 626.

Speaker, 601:

The pole came down Saturday.

Folio 602: After the machine stopped, it being

Saturday night, the men all took out for their money, and so after the men got away he and I were standing on the wharf alone. And he says to me, "What am I going to do about this iron chute up here." He says, "I want to haul on high water, and you have not told me what scow I shall use." I pointed to him, and I says, "Here's the scow lying right ahead. Take the scow lying right ahead of you, that's the most convenient." He said he wanted to haul on high water, and I told him to use that scow. So I went out then, and to have it all straight, I called some of the men back to take the iron chute down, and they laid it on the schooner.

Folio 603: He said he was going to haul on high water, and that's why he asked me to take the iron chute down and detach it there over Friday, because it ran up through his rigging, and interfered with his hauling. He asked me to take it down, so that he could haul on high water. He didn't say what high water. But he said he wanted to haul on high water.

Folio 609: Q. Did you tell the captain on Saturday afternoon, between 5 and half past 5 o'clock, that you would be down there on Monday morning, to put in another lighter, before you commenced work? A. No, sir.

Q. Did you tell him anything of that kind? A. No, sir. I told him on Saturday when we talked, and I left with the understanding when I took the chute down for him and designated the scow which he could use, I left with the understanding that he was going to haul on high water, and on the first high water. He didn't say the first high water. But he said that he wanted to shift on high water; that's the way he expressed it.

Q. He said that he wanted to shift on high water? A. That is the way he expressed it, exactly. I took the chute down for him, and told him which scow to use.

Q. Did you tell him in any way, or give him in any way to understand that you were going to shift it on Monday morning? A. No, sir; I didn't.

Q. Did you give him to understand that you considered this vessel safe there, and it was not necessary to move her until Monday morning? A. No, sir; I didn't. If I had done that I

would not have made preparations to get the pole and scow, and preparations to put another scow in there.

Q. What, if anything, did you do to aid him in shifting on the next high tide? A. I merely took the chute down for him, and showed him the scow to be used. I didn't make any preparations, any other preparations, about shifting.

Q. Did he at any time say that he expected you to do the moving? A. No, sir.

Q. Or give you to understand in any way that he thought you would do the moving? A. No, sir.

Q. State if he seemed to mean to move, or expressed the intention of moving? A. He expressed the intention of moving, and that's the reason why he asked me to take the chute down for him.

Folio 659: I had no business directing the captain when to move the vessel. He did the directing himself; that was his business. When he wanted the vessel moved that was his business to do. I never directed him to move the vessel at all. That was apart from my work altogether. I was there to assist him in moving, but I never gave him any directions when to move his vessel.

Folio 660: I had nothing at all to do with him moving his vessel. He could move his vessel as long as I could discharge into the hatch. I had no right to dictate to him where he should move his vessel.

Q. State what directions were given the only time you say the vessel was moved; who gave the directions? A. He gave the directions where to move.

Q. Did he not first ask you if he could move it? A. Why should he ask me? I had nothing to do with his moving the vessel. I don't have any recollection of him asking me (see fol. 664.)

The evidence of Capt. Hankins on this point, is somewhat different, but on the whole it sustains the evidence of Speaker.

Hankins, folio 73.—On Saturday afternoon Speaker told me that he was going to knock off at five o'clock, that being Saturday and she wouldn't tip much more anyway, and Monday morning he would put another lighter inside of us. I asked him how he was going to get the

stone on board aft after he put the lighter inside, and I said you had better knock off work now, if you are going to put a lighter in Monday morning, and not put any more stone in." He said, "We are only going to work a few minutes now, it is nearly five o'clock. Monday morning we will put the lighter in. * * *". After he had quit he told me he would be down there Monday morning to put another lighter before he commenced work again. After the men had gone up to get their pay, up to the office, it came to my mind if we waited until Monday morning I would lose something in the hauling, and if he would take the chute out that was in our hatch, I would put the lighter in between that time and Monday morning, and not lose any time. There was an iron chute that they put in the end of the wooden chute that extends from the building down to the hold of the vessel, and it was impossible for me to haul with that in there, and I wanted him to take that out. He said he would get some of the men to take that out. After they had got their pay there were two or three men came down there and took the chute off and lowered it on our deck.

Folio 105 : Q. The chute was taken out in order that the scow could be put in? A. He didn't take it out, but I asked him. He went away and left it there in the hold.

Q. You asked him to take it out, and asked him about the scow? A. I asked him where the scow was; if he would leave one there I would put it in before that time and Monday morning, so he would lose no time. He showed me a scow, a lighter, above Mr. Lee's, and told me I could take it.

Q. Did you take it? A. No sir.

Q. Did you say anything to him? And did he say anything to you as to when you were to shove her out? A. No sir; only I said I would have her in Monday morning.

Q. When did you say that you would put the scow in, or shove the schooner off? A. I told him between that time and Monday morning.

Folio 106 : Q. Did you at any time during the night or before Sunday morning, put the scow in, or shove the vessel off? A. No sir. Between Saturday night, do I understand you?

Q. Or Sunday morning? A. No sir; I didn't think it was necessary.

Q. Or any time during Saturday night? A. No sir.

Q. Why not? A. Because I didn't think it was necessary. Mr. Speaker told me there was no danger laying where we were, and I had also sounded around the vessel and found water enough.

Q. When did you intend to move the schooner out? A. I thought probably I would do it Sunday. It would be owing to the weather, winds and weather. I might have done it Sunday. I don't like to work Sunday, but if it had been fine weather, with not much wind, so she could haul easy and shove her off I would have done it Sunday. If it had been blowing I would have waited until Monday morning.

Q. How long would it have taken you to have shoved her off and put in the scow? A. Probably it would have taken me an hour to slack the lines and shove the vessel off and put in the scow.

And the other witnesses sustain Speaker.

Smith Folio 552: On Saturday morning Mr. Speaker made some reference to the advisability of getting another pole in case the captains were willing to put in two scows, so that the vessel could be shored off all the way or part of the way, as it might seem best. I sent a note to the quarry foreman to send down another pole on the scow that came down at noon, and I told Mr. Speaker that it might be well if the captain of the *Tobin* thought so, to have a second light scow lay in over Sunday, and to say to the captain of the *Tobin* and do whatever he wished him to do in the matter. * * * I know that the pole came down on Saturday; the pole I ordered.

Folio 554: I told the captain Mr. Speaker would give him anything he wanted and do anything he wanted. If he wanted a pole to shove him off more than one scow, we would give him that, or give him two scows.

Barton, Folio 615: We just had knocked off from work, and we started to go after our money, and he called us back to take the chute down before we got our money. * * * We went back and took down the chute, and laid

it on the vessel there. No. 7 scow was between the vessel and the wharf, and another light scow was lying right above the vessel.* * * She was lying there and they were going to shove her between the other scow and the vessel, and the captain said "shove her in"—

Q. When the chute was laid on the vessel where was the captain? A. They were on the vessel.

Q. Did you hear any conversation between them, and if so, state what it was? A. Just only I heard Mr. Speaker ask the captain did he think it was safe, and the captain told him yes, he thought that there was water enough there. He was measuring the water there all the time that the vessel was loading; and the captain told him yes. He said on high tide he would shove the other scow in.

Q. The captain said that to Mr. Speaker? A. Yes.

Q. What scow did he refer to? Did he point to it, or in any way indicate which he meant, which scow it was he was going to shove in?

A. I don't know whether it was No. 3 scow now, or not. It was a light scow, I know.

Q. A light scow that was there? A. Yes.

Q. Did you see anything of a pole at that time? A. Yes, sir; there was a pole brought down the same day, on Saturday, and there was one on the vessel that she was propped out with.

Q. What time was this on Saturday that you took down the chute and heard this conversation? A. It was about 5 o'clock in the evening, sir.

Taylor, Folio 626 :

Q. Did you hear any conversation between the captain and Mr. Speaker at that time (when the chute was taken off), about putting in a scow? A. Yes, sir.

Q. If so, what was said? A. He told Mr. Speaker that he would put that scow in on high tide.

Q. What scow was it? A. I don't know the number of the scow.

Q. Where was she? A. She was lying up at the bow of the vessel.

Q. In plain sight? A. Yes, sir.

Q. What did Mr. Speaker say? A. He told him all right, sir.

(16) The point of the rock was about 40 feet from the wharf and it came in contact with the vessel a little aft of amidships.

Hawkins, fol. 89.

Fol. 117:

Q. I suppose you know how far the rock was from the outer edge of the wharf? A. Yes, about 40 feet.

Q. Forty feet from the outer edge of the wharf to the inner edge of the rock? A. I don't know it was the inner edge, it was the highest point. I couldn't tell exactly.

Purson, fol. 144: "This drawing represents the rock as near as I could get it."

See diagram at p. 90.

Fol. 146:

Q. Can you tell us what part of the rock was farthest from the wharf—was it the highest or lowest? A. Highest part.

Q. The highest part was the farthest from the wharf? A. The highest part; there is not much difference, but the highest part is furthest from the wharf.

Hankins, fol. 116: "I sounded there with a diver at the bottom to hold the stick on the rock, at 11.15 A. M., November 29th, and found 12 feet and 6 $\frac{3}{4}$ inches of water on the rock, at that time. At one o'clock P. M. it was high water, and the tide had raised 11 inches from the time I measured until high water, which made 13 feet and 5 $\frac{3}{4}$ inches on top of the rock at high water."

Harp, fol. 168: I marked on Exhibit No. 5, 12 feet and between 8 and 9 inches from the top of the rock to the surface of the water.

(17) The schooner was 32 feet wide. She lay outside of a scow or lighter which was about 20 feet wide, there being piles along the face of the wharf, so that the schooner lay about 24 to 28 feet from the wharf, aft. If another scow 20 feet wide had been put in between her and the dock, her side

would have been 44 to 48 feet out from the dock, or 4 to 8 feet outside of the point of rock.

Hankins, fol. 98 : " There was a lighter lying inside of us all the time she was there.

See Smith (fol. 773) and Measurement of Scows at fol. 849.

Hankins, fol. 73 : About 3 or 4 o'clock Saturday afternoon * * * I breasted her off about well over two feet, I suppose, further than what she was.

Hankins, fol. 117 :

Q. How wide was the scow that was between you and the wharf? A. Eighteen feet, I think, Mr. Speaker told me she was; I didn't measure the scow.

Q. How far was the schooner from the outer edge of the scow when she sunk? A. She was about 2 feet forward and 6 feet aft.

Q. Just the same position she was on Saturday? A. Yes, sir.

Q. That would be about 20 feet forward? A. Yes, sir.

Q. And how many feet aft, 24 feet aft? A. Yes, sir; 24 feet from the wharf aft, and say 18 feet from the wharf forward.

Brewer, fol. 175 :

Q. State if you can by looking at that map how far the schooner there sunk when she was on the rock or other obstruction; how far was her starboard or right side from the fourth pile marked here on the wharf? A. I can approximate; I guess about 28 feet.

Fol. 181 :

Q. By actual measurement what was the distance from the vessel's edge to the edge of the wharf? A. That is about 27½ feet.

See Barkley, fol. 492.

(18). There is a conflict of evidence as to whether the appellants or their agent made any representations to the master of the vessel as to the depth of the water. But there is no dispute that the master of the vessel was instructed by the appellants to ascertain the depth of water in the berth by

sounding. And he did sound and also caused soundings to be made for that purpose.

Barkley, fol. 51: On Saturday afternoon I seen the captain sound myself.

Hankins, fol. 72: Friday, I think somewhere along towards eleven o'clock, I was in Mr. Lee's, and Mr. Smith came in. Mr. Lee gave me an introduction to Mr. Smith, and told me he was the gentleman I was loading for. That was the first time I had seen him. I asked Mr. Smith how long it would take to load her. He told me he thought he should finish me on Monday. He could load about 150 tons a day. I asked him how much water he had there. He said that he had had it dug out this spring, in April, and that they were to make 14 to 15 feet, and that there was 14 feet, sure, at low water. Mr. Smith told me he would like me to make some soundings for myself. He said there might be something dropped over from the lighter he didn't know of, but would like me to sound. * * * I told the mate what Mr. Smith told me about the water, and about sounding, and if hauled when I was not there to be sure and sound and find the depth of the water. After dinner I went up to Mr. Lee's store again, and came down about 3 o'clock, on board the vessel, and the mate had just hauled her, just got her fast. I asked him if he sounded, and he told me he had.

Folio 73: He (the mate) told me they had 13 feet of water. I took the lead line and marked it off, and went on board. I marked it off in feet, and tied rope yarn around the lead line, and I measured with my rule one foot apart, and then took the lead and sounded for myself. I commenced aft and sounded up to the mizzen rigging; the least I found was 13 feet, and 2 or 3 inches, and after I got by the mizzen, that piling where Mr. Speaker told me it was dug out to, it deepened off to 16 or 17 feet.

Folio 74: On Saturday, after they had all went home, I took the lead and sounded all around the vessel, and then it was about low water. I didn't find less than 12 feet anywhere on the inside, and I didn't find less than 14

feet and a half on the offshore side ; and right over our stern, about four feet inside of our keel, there was 13½ feet of water.

Folio 85 : Q. Captain, when you mention the fact that Mr. Charles E. Smith, Jr., told you to sound, what did he say? Please state his exact words, as well as you can. A. When I asked him how much water there was he says we had it dug out to 14 or 15 feet, at low water, "but I would like you to make some soundings for yourself." He said, "There is not less than fourteen feet."

Q. Well, you sounded accordingly? A. I did.

Q. Where did you sound? A. All around the vessel.

Q. You sounded all around the vessel? A. Yes, sir. From one end of it to the other, on both sides.

Q. Why did you sound around the vessel? A. I wouldn't say all around, but from one fore rigging around to the other fore rigging.

Q. Why did you sound all around? A. To see what kind of bottom there was.

Q. Had Mr. Smith spoken of the condition of the water in the middle of the berth? A. Mr. Smith told me it was dug out to that piling, that is in April.

Q. That was your reason for sounding around and not under the vessel? A. I couldn't sound under the vessel. That was impossible. I could sound all around, which I did, and found nothing to hurt the vessel, nowhere I could sound. * * *

Q. You didn't sound aft of the rigging of the after mast? A. I sounded abreast of it.

Q. Did you sound inside or outside the vessel? A. Both.

Q. You sounded on both sides? A. Yes, sir.

Q. You sounded inside and outside after the mizzen rigging? A. Yes, sir, and forward of it too.

Q. On both sides, or one? A. Both.

Folio 97 : The last time I measured before she sunk was about Saturday night, after we quit work, about 6 o'clock; then it was about dead low water. I sounded on both sides, and I didn't find less than 12 feet of water aft, abreast of this piling I speak of. And, after I got to this

piling I didn't find less than 15 feet of water, and on the other side I didn't find less than fourteen feet of water, and after I got opposite the piling it went to 17 or 18 feet.

Folio 101:

Q. And Mr. Smith told you he would like you to sound for yourself? A. He said he would like me to make some soundings for myself.

Q. That was what time of the day? A. I think it was a little before noon. I should judge about 11 o'clock.

Q. What did you say in reply to that advice of his? A. I told him I would.

Q. And did you do it? A. I did.

Q. Immediately? A. No, sir, not immediately.

Q. When? A. I did that afternoon.

Q. What time? A. I sounded the first time along about two or three that afternoon. I went and got my lead line, and marked it off in feet, and commenced right aft of the quarter on the starboard side of her, and sounded about every four feet, as near as I can state, with the lead. I walked right along the deck of the vessel and dropped the line just so it was against her side, up to the forerigging on the starboard side. Then I took the lead line in and went on the port side and did the same.

Q. So the only part you didn't sound around the vessel was between the forerigging and the stem? A. That was it. Yes, sir, I didn't sound there.

Q. What distance is that? A. I should say about 12 or 15 feet.

Folio 122: After I had an introduction to Mr. Smith, and he told me how much water there was—that there was 14 feet sure, at low water—he told me that he would like me to make some soundings around for myself, and he said he would have his men help my men shove off with a pole that he had on the lighter, whenever we wanted to shove off, and he wanted me to sound on the inside, as some stone might have gotten off the lighter. And if we shoved her bilge off, or side he called it, so we didn't hit the stones, there was nothing to hurt us. And when he came on the dock that afternoon he told me the same thing.

See fol. 917.

Fol. 123 :

Q. Did you make any soundings when you were lying above the wharf, before you took your position? A. He told me there was plenty of water there.

Q. I wish you would answer my question, I didn't ask you that; I asked you as a matter of fact, if you made any soundings? A. No, sir.

Q. You could have made soundings, could you not? A. When I first made fast to the dock, when I first came up, I couldn't.

Q. Why not? A. Because there were three scows abreast there; that is the reason I couldn't get to the dock with the vessel.

Q. Could you, just before you went to the dock? A. Yes, sir.

Q. How long would it take to move the vessel away from the wharf to make the soundings? A. I couldn't move the vessel away from the wharf to make the soundings.

Q. Why not? A. I had nothing to breast her with.

Q. Was there no pole there? A. No, sir; there was a pole there 25 or 30 feet long, but that was not long enough.

Q. Did you ask for a longer pole? A. No, sir.

Lee, folio 129 : On August 3d the captain was in my office, and Mr. Smith came in there, and I introduced him to Mr. Smith. I said, "Captain, this is your shipper, and you will have to make your complaints to him." The captain said, "How about the water there." Well, I presume I ought to have allowed Mr. Smith to answer the question, but I answered it for him, and I said the dock had been dredged out, supposed to be 14 feet, though he might touch at low water. Mr. Smith said to him, "I want you to make some soundings for yourself, and our Superintendent will help you to place the vessel."

Folio 137 :

Q. When you introduced Capt. Hankins to Mr. Smith, which was some little time then after the contract had been actually made, through you? A. Yes, sir.

Q. And the vessel was then being loaded, wasn't it? A. It was between 9 and 10 o'clock in the morning that I introduced him.

Q. Of what day? A. The third, the day they commenced loading. * * * The vessel came down on the second; I put it down on the memorandum.

Q. Then you think it was the third that you had this conversation with Mr. Smith? A. I am satisfied it was the next morning.

Q. You do not know whether it was Friday, or not? A. I don't know the day of the week.

Q. In that conversation did you hear Mr. Smith say anything about the depth of water? A. No.

Q. You did hear the conversation about the soundings? A. He asked the captain to sound for himself; yes, sir.

Folio 139: The captain asked as to the water, and I replied that the dock had recently been dredged out, supposed to—14 feet, at low water; “though your vessel might ground at low tide.”

Twiford, folio 236: I proposed to Mr. Speaker to go aft with me and sound and see how much water there was, because the captain asked me to sound the depth of the water if we hauled astern. I did so. I found about $13\frac{1}{2}$ feet of water on the inshore quarter. And about half way between the davits and the rudder I sounded again, and I found about $14\frac{1}{2}$ feet, well, between 14 and a little over 14 feet, $14\frac{1}{2}$. Then I also took the lead abreast of her aft hatch, and sounded there, and there was about 15 feet; that was on the inshore side.

Folio 238:

Q. You say you sounded first and found $13\frac{1}{2}$ feet on the inshore, did you say that—the inshore quarter? A. Yes, sir.

Q. About how far was it from where you dropped the lead to the long chute? A. It was probably eighty feet.

Q. After you sounded and found 15 feet on the inshore side did Mr. Speaker say anything about the condition of the water? A. Yes, sir.

Q. What did he say? A. He said the water was deeper *further ahead*. See *folio 242*.

Folio 243:

Q. Where did you make the first soundings? A. Aft.

Q. Whereabouts? A. I suppose it was about eighty feet from the chute.

Q. How far from the stern? A. I will say from 6 to 8 feet.

Q. Where you made the first sounding was there anything between the vessel and the wharf? A. I don't think there was, to the best of my judgment.

Q. What was the depth you found there? A. 13½ feet.

Q. Where did you make the second sounding? A. Right over the taffrail.

Q. How far from the stern? A. It was precisely at the stern; the taffrail is what we call the stern of the vessel; the yawl boat at the davits. I dropped the lead between the yawl boat and the taffrail.

Q. The second sounding was at the stern? A. Yes, sir.

Q. What depth did you find there? A. 14 feet.

Q. And how far was the stern from the wharf? A. The stern was, I guess, about 22 feet from the wharf; right at that place.

Folio 245 :

Q. Did you ever sound on the outside? A. No, sir.

Q. Never? A. No, sir.

Q. Did you ever see the Captain sound on the outside? A. No, sir.

Q. Since you went there? A. No, sir.

Q. And the soundings you made were the only soundings you know of being made when you got there? A. Yes, sir.

Re-Direct.

Q. You said you did not sound after those three soundings? A. No, sir.

Q. Why didn't you sound after those three soundings? A. Mr. Speaker said "you needn't sound any more, there is plenty of water forward, where you are to haul your vessel."

Smith, folio 516 : I think the captain asked what the depth of water was in front of the wharf. Mr. Lee answered the question. I don't know whether the captain asked me, or asked Mr. Lee, but Mr. Lee answered him, by saying that it had been dredged out in the spring to the supposed depth of 14 feet. The captain had some conversation with Mr. Lee, I think, as to about what water he drew, and he also said it wouldn't hurt him to lay on the bottom if the bottom

was in decent shape. I told him I didn't know just what the bottom was, but I would advise him to make his soundings there, and find out from time to time just how his vessel was laying; that I would see that he had any assistance he wished in moving the vessel forward or aft, or shoving her out; that we would do just what he wanted done; and that after he made his soundings he could tell me what he wanted done.

Folio 567 :

Q. Did you tell Captain Hankins at any time to sound inside his vessel and near about the third or fourth piling? A. No, I never said anything about any piling.

Q. Did you tell him to sound inside of his vessel, because some stone might have dropped off the lighters? A. I may have told him that there might have been some small stone in there.

Q. When did you tell him that? A. If I told him at all it was when we were in Lee's store. I told him to sound; I don't recollect anything particularly about it. I might have told him that some small stone would have been likely to have dropped in there, as we are handling stone on the wharf all the the time.

See also Speaker, folios 594, 596, 604, 607, 608, 613, 673, 679, and Hankins, folio 920.

(18) The wharfingers did not know of the existence of any such rock. Answer, folio 26.

Smith, fol. 534.

Assignment of Errors.

1. The Court erred in not reversing the decree of the Court below.

2. The Court erred in not dismissing the libel with costs.

3. The Court erred in denying relief to the appellants upon their cross libel.

4. The Court erred in decreeing that the libellants were entitled to recover against the respondents, by reason of the facts shown in the record.

5. The Court erred in not holding that the proximate cause of the injury to the libellant's vessel was the Master's allowing her to remain in the berth after he knew of the depth of water, and knew that she had touched the bottom at low tide.

6. The Court erred in its decree of August 27, 1895, in decreeing "that respondents, Charles G. Smith and Charles G. Smith, Jr., are solely liable for such injury and the damages thereby resulting to the libellants," as therein referred to (p. 584).

7. The Court erred in its decree in deciding that "eight thousand dollars was the market value of said schooner at the time of her injury and wrecking August 6, 1893" (p. 687).

8. The Court erred in decreeing that the libellants were entitled to interest on the said amount from the said 6th day of August, 1893. (p. 687).

9. The Court erred in allowing to the libellants the cost of raising the cargo from said vessel, with interest from November 5, 1893 (p. 687).

10. The Special Commissioner erred in his finding and report in reporting "the value of the 'Ellen Tobin' immediately prior to the injury at the round sum of \$6,000" (p. 589), and which finding respondents

excepted to (p. 659), and which exception the Court overruled (p. 686).

11. The Court erred in dismissing the cross-libel filed by the appellants, with costs (p. 687).

12. The Court erred in making the decree of April 6, 1897 (p. 699).

First Point.

The appellants' wharf is on the bank of a public navigable river.

The bottom of the river is owned by and is under the jurisdiction and control of the United States.

The bottom of the river in front of the appellants' wharf is of rock (fol. 1039), and of such a character that it would be impossible to make or keep it absolutely and perfectly even and level (fols. 433, 441). This is conclusively shown by the Government Survey of the Georgetown channel in front of the wharf, made in 1884 (p. 584) and Wanner's chart at p. 468.

The libellants had no charter party or written agreement by which a certain depth or a sufficient depth of water was guaranteed.

The appellants' wharf was used exclusively for loading and unloading stone.

No charge was made for wharfage.

The libellants on Wednesday afternoon, August 2, put their vessel in front of the appellants' wharf, outside a scow 20 feet wide that was at the wharf.

When she took her position outside the scow, the vessel drew 7 feet 10 inches aft, and about 7 feet forward.

It was the intention of the captain to load with 600 tons of crushed stone, and when so loaded the vessel would draw $14\frac{1}{2}$ feet of water.

The stone was to be put on board by the appel-

lants, but the distribution of the load on the vessel, the quantity to be taken on board, and the movements of the vessel were under the exclusive control of the master.

Under these circumstances the duty of the appellants was performed, if they exercised reasonable and ordinary care to have and keep the place where the vessel lay in reasonably good and fit condition, and to notify the master of any hidden obstruction which would endanger his vessel, of which they knew, or could have known by the exercise of reasonable care.

On the other hand it was the duty of the master, before fully loading the vessel, to ascertain whether the draft of water in the berth was sufficient for his vessel when loaded and drawing $14\frac{1}{2}$ feet of water.

It was his duty, after she was in her berth, to exercise reasonable care and skill and due diligence in the management of his vessel, to avoid known dangers, and to take reasonable and ordinary precautions for her safety.

If the loss of the libellants' vessel was directly and solely caused by the negligence of the appellants to perform their duty, the appellants are responsible for the loss.

If the loss was directly and solely caused by the negligence of the master and his failure to perform his duty, then the appellants are not liable.

If there was negligence which contributed to the injury, both on the part of the appellants and the master, then the loss resulting therefrom must be shared equally by the libellants and the appellants.

Second Point.

This case differs from most of the cases cited by the Court below, in that the point of rock appears to have been a part of the natural bed of the river.

It was not a part of the construction of the dock, as were the cases of *Leonard v. Decker*, 22 F. R., 741, and *Smith v. Havemeyer*, 36 F. R. 928.

Nor was it a case of piles driven into the bottom of the river and negligently left there, as were the cases of *The Phil. etc., R. R. Co. v. The Phil. etc., Towboat Co.*, 23 Hun, 209, and *Penn. R. R. Co. v. Atha*, 22 Fed. Rep., 920.

Nor was it a case of the berth being allowed by the owners of the wharf to become filled by extraneous substances, as was the case of *Sawyer v. Oakman*, 1 Lowell, 134, and *The Stroma*, 50 Fed. Rep., 557.

Nor was it a case of a guaranty of a certain depth of water as were the cases of *The Annie R. Lewis*, 50 Fed. Rep., 556, and *McCalden v. Parks*, 66 Hun., 323.

It was more like the cases of *Christian v. Van Tassel*, 12 F. R., 884; *O'Rourke v. Peck*, 40 F. R., p. 907 and *Barber v. Abendroth*, 102 N. Y., 406, as to the cause of the injury, although those were cases of loaded vessels coming to a dock to discharge instead of unloaded vessels coming to load.

Third Point.

It is surely the fact that the presence of any rock in the river, which would prove dangerous to the vessel while loading at the appellants' wharf, was not known to the master of the vessel when he went to the berth.

It is equally clear that the presence of such a rock was also unknown to the owners of the wharf.

For it is certain that, if the presence of such a rock had been known to the owners of the wharf, they would not have incurred the risk of the vessel's being injured by it, but would have warned the Master of its presence.

The Court below says (fol. 697) that "It would be difficult to conclude on the evidence in this record, that the appellants did not have knowledge of the existence of the rock and of its dangerous nature."

With great respect for the Court below, we must say that it seems to us *impossible to conclude that they did* have such knowledge.

The evidence is positive that they had no such knowledge.

Smith, fol. 534.

And it is utterly incredible that, if they had such knowledge, they should have allowed the Master to place his vessel where she was liable to receive injury.

It is true, as the Court below says, that it appears that in December, 1892, eight months previous, a vessel, the *Francis H. Bird*, had got on a rock in front of this wharf, and that the owners of the wharf knew it at the time. But it is equally true that the Master of the *Tobin* was informed of that fact (Speaker, 613-656).

And it is equally true that in the following spring the appellants had had the berth dredged out, had enquired of the dredger as to the depth of water obtained, had been informed by him that there was a depth of water in the berth of 14 or 15 feet (fol. 825), and had seen that soundings were taken which apparently showed it to be so.

Moreover several vessels had loaded at that wharf, some of them larger than the *Ellen Tobin*, and had received no injury.

(*Smith*, fol. 516 and 837 to 842).

Among them was the *Mattie B. Russell* with 550 tons of stone in December, 1892, the *Henry D. May*

with 490 tons in November, 1892, the *John R. Fee* with 520 tons in July, 1892, the *Sunlight* with 700 tons in October, 1892, and after the dredging the *A. Denike* had loaded 650 tons there in March, 1893, without injury.

None of these vessels had happened to get on this point of rock.

(See *The Angelina Corning*, 1 Ben., 139.

See also the pictures of the rock made by Hankins p. 570, and Pierson p. 90).

And, in the face of the fact that all these vessels had loaded in that berth without injury, and that the berth had been dredged as above stated, the wharfinger was certainly not negligent in understanding that there was no obstruction in the berth which would endanger this schooner.

And moreover, whatever knowledge the appellants had as to the existence of such a rock, viz., that one vessel had touched the bottom, was communicated to the Master of the schooner. Speaker swears that he told the Master about it on Thursday or Friday (fol. 613) and he is not contradicted.

Fourth Point.

The case is not one in which any representation has been made by the owner of the wharf as to the depth of water, or relied upon by the Master of the vessel.

The libel alleges that it was such a case. It avers that the Master of the vessel "had first made full and all proper inquiry of the foreman of the wharf as to what depth of water the berth in front of the wharf contained and had been informed by said foreman *that it contained 14½ or 15 feet of water at low tide* (fol. 4). But this is denied (fol. 23), and the evidence does not warrant the finding that the allegation is correct.

Hankins, the Master, who had sworn to the above statement in the libel was examined as a witness on this point. He testified to three conversations, one with Mr. Lee, his own broker (fol. 68), on Tuesday, August 1, one with Mr. Speaker on Thursday, August 3, after the vessel was in her berth, and one with Mr. Smith, the owner of the wharf, on Friday morning in Mr. Lee's office. (See No. 18 *ante*.)

(1) As to the first conversation Hankins says he asked Lee how much water there was and told him the vessel would draw $14\frac{1}{2}$ feet loaded, and that Lee told him he could "load there at 14 feet with low water." ((fol. 69-70).

But Mr. Lee says I told him they "had recently had the dock dredged out to a *supposed* depth of 14 feet, *though your vessel might* ground at low water. (fol. 128).

And Lee is libellants' witness.

(2.) As to the second conversation Hankins says that after the vessel was in position he asked Speaker how much water there was and Speaker "said it had been dredged out to between 14 and 15 feet this Spring." (fol. 71).

Speaker says, "I never gave the Captain any statement about the depth of water there (fol. 594), and that the Captain did not speak about the depth of water till Friday. (Fol. 638).

"The only conversation the Captain and I had with regard to the water was that he asked me about the water and I told him we never had any trouble except with one vessel; that we had one catch on us there but that we had extremely low water and a northwest wind. I told him that we had had it dredged out and the man that dredged it reported 14 or 15 feet of water. He said 'I don't draw that much water when I am loaded.' * * * That is the only conversation I ever had with the Captain." (Fol. 613).

(3). As to the third conversation Hankins says "I asked Mr. Smith how much water he had there. He said that he had it dredged out this spring in April and that they were to make 14 or 15 feet and there was 14 feet sure at low water" (fol. 72). But Lee says that when Hankins asked about the water he (not Smith) answered that "the dock had been dredged out, *supposed to be* 14 feet, though you might touch at low water" (fol. 129). And Smith says the same with an unimportant variation (fol. 516).

Several considerations are manifest with reference to the above conversations.

First: Whatever the conversation was between the captain and Mr. Lee, on the first of August, it cannot amount to anything as against the owners of the wharf, because Mr. Lee was the captain's broker and not the agent of the owners of the wharf to make representations about it at all (Hankins, fol. 68; Smith, fol. 517-520). And, again, in the conflict between the captain and Mr. Lee as to what was said, Mr. Lee's evidence should be taken, because he is a disinterested witness and called by the libellants. And it should be held that Mr. Lee only told the captain that the dock had been dredged out to a *supposed* depth of 14 feet and that his vessel might ground at low water. This conversation can, therefore, be no basis for a charge that any specific representation had been made by the owner of the wharf as to a depth of water of 14 *and a half* feet.

In the second place, as to the conversation between Hankins and the foreman, it is not pretended that it took place before the vessel went into the berth. And there is a positive conflict between the captain and the foreman as to what the foreman did say at that time. And it cannot be held, therefore, that the libellant has proved that the foreman made the representations which are alleged.

In the third place, as to the evidence of the master as to what was said in the conversation between him and Mr. Smith, in Lee's office on Friday, Mr. Lee

and Mr. Smith are two to one against the captain. And they testify that the captain was told not that there "was 14 feet sure at low water," but that "the water was *supposed to be 14 feet*, though he might touch at low water." In this condition of the evidence, it must be held that the libellants have failed to make out that there was any representation as to a specific depth of water in the berth.

In the fourth place, the master of the vessel did not rely upon what had been told him by either Mr. Lee or the foreman, for he renewed the inquiry of Mr. Smith.

And in the fifth place, it is proved without dispute that in the conversation between the master and Mr. Smith, he was told by Mr. Smith to *sound for himself* and find out the depth of water, and that the foreman would give him all assistance in moving his vessel, if he desired to move her for that purpose. Capt. Hankins concedes that this was said to him, and that he said he would make the soundings; and he testifies over and over again that he did make soundings accordingly, and directed his mate to make soundings, and that the mate made soundings.

The case, therefore, is one in which the owner of the wharf did not make positive representations as to a depth of 14½ feet of water, as the libellants alleged, but, on the other hand, spoke of a *supposed* depth of only 14 feet, and directed the master to find out the depth of water for himself. And the master agreed so to do, and made soundings accordingly.

It cannot be held, therefore, that there was any reliance by the master of the vessel on any representation whatever.

In this respect the case is exactly like the case of *The Calliope*, 16th Appeal Cases, p. 11. There the master of the vessel received a letter saying, "You can bring your steamer to the wharf Monday morning's tide, as we have two feet more water than at Bathurst Basin. Pilot will tell you what to do."

The Chancellor, in deciding in favor of the owner of the wharf, said: "It is impossible to doubt that under ordinary circumstances that would mean this: 'This is information which I give you for the purpose of forming your own judgment whether you can come there or not; that is to say, this is the height of water which may be expected at such and such a time, but you, the person in charge of the navigation of the vessel, the captain or the pilot, must form your own judgment, and you must not expect me to give you a warranty that that height of water will exist; but you, the captain or the pilot must form your own judgment upon it and must act accordingly.'"

That is exactly this case. Mr. Smith's telling the captain that he did not know what the bottom was and that he must sound for himself (fol. 85) was, as in that case, a notice to the captain that he "must form his own judgment and act accordingly."

The court below says that the case of *The Calliope* "has no application to the present case" (p. 698-9). The court seems to have paid little attention to the case of *The Calliope*. It was not a case of injury to a vessel "while lying at a wharf," as the Court says. *The Calliope* was injured while *coming to the wharf*. It was a question of approach to a wharf. Moreover the court says that it was a case in which there was "no representation or assurance as to the depth of the water." But there was a stronger representation, as above quoted, than in this case.

The two cases are very nearly identical. The master of the *Culliope* undertook to *take* his vessel into the berth when there was not water enough, as he had reason to know. The master of the *Tobin* left his vessel in the berth when he knew there was not water enough, as we shall show.

Fifth Point.

But it is quite immaterial whether any representation was made to the master, that there was $14\frac{1}{2}$ or 15 feet of water in the berth at low tide, *because both the master and the mate knew on Friday afternoon that such was not the fact.*

(a) The master told the mate what Mr. Smith had said about sounding and told him if he hauled the vessel when he (the captain) was not there, "to be sure and sound and find the depth of water."

See Ante., No. 18. Hankins, fol. 72.

(b) The captain was not there when the mate hauled the vessel. The mate swears that after he had hauled the vessel he sounded and found, between the rudder and the taffrail, 14 feet of water and on the inshore quarter $13\frac{1}{2}$ feet.

Ante., No. 18. Twiford, fol. 236.

This was a little after two o'clock, the mate says. High water was at 12.32 o'clock (*Ante., No. 9*). So that the tide was then one third down and the mate had been told by Speaker the day before that the tide rose and fell about 3 to $3\frac{1}{2}$ feet. (*Ante., No. 10.*)

(c) The mate therefore knew that the tide had two feet more to fall and that at low tide, where he had found $13\frac{1}{2}$ feet, there would be but $11\frac{1}{2}$, and where he had found 14 or $14\frac{1}{2}$ feet there would be only 12 or $12\frac{1}{2}$.

And the vessel was then drawing 13 feet aft.

Ante., No. 8. Hankins, fol. 94.

The mate, therefore, then knew that instead of there being " $14\frac{1}{2}$ feet of water at low tide," there would not be over 12 or $12\frac{1}{2}$ feet at low tide where he sounded.

(d) When the master came, just after the vessel was hauled aft, he asked the mate if he had sounded; and the mate told him he had and that he had 13

feet of water. Not content with that, the master took the line and sounded himself and says that the least he found was $13\frac{1}{2}$ feet. So that the master himself knew that instead of there being $14\frac{1}{2}$ feet at low water there was only $13\frac{1}{2}$ feet, with about two-thirds of the ebb yet to sink, leaving $11\frac{1}{2}$ feet at low water.

(e) This knowledge on the part of the master makes any claim that the owners of the wharf represented that there was $14\frac{1}{2}$ feet of water at low tide immaterial, because if any such representation had been made, it was a mistake; and the master knew on Friday afternoon that it was a mistake, and knew that at low water on that afternoon, with the cargo she had in her, the vessel would touch the bottom.

(f) If it be asked why, having that knowledge, the captain did not at once move his vessel into deeper water, the answer is that he expected his vessel to touch bottom at low water and was willing to take the risk of it. Lee and Smith both told him she might touch at low water, and the captain said it would not hurt him to lie on the bottom if the bottom was in decent shape, and Smith told him he did not know just what the bottom was and the captain had better make soundings from time to time.

Ante., No. 18. *Smith*, fol. 516.

That his vessel might touch bottom at low water was in the captain's mind, and therefore, probably, he did not move her when the soundings which he made warned him that she would do so.

(g) And, moreover, the master learned by his own soundings that the bottom of the berth was not flat, and that his vessel, if she did touch the bottom, would find it uneven.

He sounded on Friday afternoon, just after she was hauled, and found 13 feet and 2 or 3 inches, and then by the mizzen he found 16 or 17 feet (fol.

73). Then he breasted his vessel off and sounded again and found the same difference in the depth of water.

Here was then, as he knew, a difference of three or four feet in the height of the bottom under the vessel.

(h) Without dispute then, on Friday afternoon, while his vessel was still afloat, the master had actual knowledge that his vessel must rest on the bottom at low water, and that that bottom was not level, but had an inequality of height of two or three feet.

Sixth Point.

Not only is the case one in which a master of a vessel, knowing on Friday afternoon that the bottom of the berth in which she lies is uneven, having an inequality of two or three feet, and knowing that his vessel must at low tide touch bottom, does not remove her from the berth, but leaves her there and continues to take in cargo till she does touch, but it is a case in which it furthermore appears that on Saturday afternoon the vessel was actually touching bottom at low tide and lying unevenly on the bottom, and the master knew it, and still did not remove her from the berth when he could have done so, but allowed her to come down a second time upon the inequality which had raised the stern of his vessel two feet at the previous low tide.

(1). It is shown without dispute by the evidence of Capt. Hankins that, on Saturday afternoon when they knocked off work, he saw that his vessel, having 300 tons of cargo in aft and only 100 tons in forward was *down by the head* 20 inches or 2 feet, drawing 12 feet 10 inches forward and about 10 feet 10 inches aft. (See evidence under No. 12, *Ante.*).

(2). And it is proved by the evidence of the libellants' witness, Stephen W. Smith (although it needs

no evidence to prove it) that this fact *demonstrates* that the vessel was then resting on something aft of amidships. (See *Ante.*, No. 14).

(3). The master apparently claims that the necessary conclusion to be drawn from this fact is affected by a conversation which he says he had with Speaker, the foreman. He says that when he saw that his vessel was thus down by the head "he asked Mr. Speaker if she *was not on something*, that she seemed to tip too much" (fol. 73), and that Speaker said, No! she was on nothing.

Mr. Speaker gives a very different story as to the conversation (fol. 602) and denies positively that he said any such thing (fol. 608).

But, if we take it to have occurred exactly as Capt. Hankins says, it makes no difference. For Capt. Hankins could not have believed that the vessel was not touching bottom, *whatever any one said about it*. Nothing else except her resting on something could possibly lift her stern two feet.

(4). It is true that when Capt. Hankins, after he had testified that the vessel was from 20 to 24 inches down by the head, was asked if she was afloat, he answered :

"I don't know whether she was, when we knocked off, or not." (Fol. 98).

If there could be any other possible explanation of the fact that the stern of the vessel, with 300 tons of stone in her aft, and 100 tons forward, was lifted two feet out of the water at the stern, except that she was held up by something, this statement of the master, that he *did not know* whether she was afloat or not, might possibly be accepted. But, there being no other possible explanation, this statement of his is substantially false. His further testimony shows it; for the question is put immediately. (Folio 98).

Q. What is your best knowledge? A. I think she was not afloat.

And again :

Q. Your own opinion was she touched? A. I thought so before I sounded.

And he testifies that:

I asked Mr. Speaker if she didn't touch something, and he said, No. And that was the reason I sounded after six o'clock. And after I sounded it convinced me she was afloat, because I didn't strike any shallower water than what floated her.

It is too obvious to require discussion, that when the master concedes that he thought she touched because she was down by the head, there was nothing in the fact of the depth of water which he found *outside of the vessel* which had any bearing whatever on the question of whether she was aground. If she was aground she was on something *under her bottom*, which would not be affected by the depth of water outside of the vessel.

(5). Moreover as to the conversation between the captain and Speaker.

It is quite plain that Speaker had no knowledge at the time of that conversation of the controlling fact, viz., *that the vessel was down by the head*, while the captain knew by the marks of the vessel that she was nearly two feet down by the head. He says he did not have to look at the measurements, *he knew by the marks*. "All you had to do was to look at the marks" (fol. 96). Of the marks Mr. Speaker knew nothing, and the captain did not tell him. Mr. Speaker was not informed, therefore, of the controlling fact as to the situation of the vessel. Moreover, it does not matter what Mr. Speaker or any one else said at that time. The captain knew that his vessel, with three hundred tons of cargo aft, and only one hundred tons of cargo forward, was down by the head nearly two feet. He knew, therefore, that something under that vessel was lifting her stern out of the water two feet. That fact was not affected at all, either by what anyone said to him or by his afterwards sounding alongside of

his vessel, as he says he did. The object which she rested on was under her and lifted her, *whatever the depth of water was outside of her.*

(6). There is no dispute but that it was then understood by the master that, before any more cargo was put in her, the vessel must be moved out. (See *Ante* No. 15.) Why was this? No reason can be suggested except that she was then touching bottom.

(7). The Court below disposes of this branch of the case as follows (p. 696): "There is an entire failure of evidence, to establish the fact as attempted to be shown by the appellants, that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel while she was moored at the wharf, for the purpose of being loaded."

It is incomprehensible to me that the Court could have come to such a conclusion. For there is absolutely no dispute as to the facts which we have above set forth, namely, the knowledge of the mate and of the captain, as to the depth of the water resulting from their soundings, and their knowledge of the fall of the tide. Nor is there any dispute as to the knowledge by the master that his vessel's stern was lifted two feet out of the water on Saturday afternoon, by reason of her resting on an inequality of the bottom.

If the Court below overlooked this evidence, it made a great error in saying that there was a *failure of evidence* on this point.

If the Court below perceived these facts, and still held that the master exercised due care in allowing his vessel to come upon the obstructions the second time, that surely was a very great error as to the law. No case can be found to sustain such a proposition, and the authorities lay down an exactly opposite rule.

Seventh Point.

The law, as laid down by the Court below, as well as the cases cited by it, is applicable to the case of a vessel brought into a berth and there injured by an obstruction in the bottom of the berth which is, or ought to have been, known to the owner of the wharf, *but is not known to the master of the vessel*. And in that case the law is laid down that the owner of the wharf, and not the vessel, is liable for injury which is received by her by reason of the obstruction.

But the question which arises in this case is not whether the owner of a wharf is liable for injury to a vessel coming to a berth alongside his wharf, by reason of an obstruction, *of which the master of the vessel is ignorant till his vessel has received the injury*.

The question here is whether the owner of a wharf is liable for injury caused to a vessel in a berth alongside the wharf by her *coming a second time* on an obstruction, which is known to her master to exist—known to him, because his vessel *has rested on it once*.

The master of the *Tobin* had notice on Friday afternoon that his vessel would touch bottom at low water, if she drew 13 feet. He knew on Saturday afternoon that she had touched, drawing 12.10 forward and 11 feet aft, so as to lift her stern two feet out of water.

We insist that it then became the master's duty to remove his vessel from that situation at the first opportunity, namely, sometime during the next high tide. He was bound to know that, if he left her in the same place until the next low tide, she would again rest upon the same obstruction, which would lift her stern again two feet out of the water. It needs no argument to show that that would be a dangerous thing for any vessel, and that the natural thing to be expected from such a situation would be that, even if a vessel had been able to stand the

strain of lying in such a position on that tide, she might not stand a repetition of it, especially in the face of the fact that the rise and fall of the tide was not exactly uniform. The master of the vessel, therefore, was required, when he knew that his vessel was thus resting on an obstruction which lifted her stern two feet out of the water, to take measures to remove the vessel from danger of being injured by reason of her coming down on the obstruction a second time; and if he chose not to remove her, he took the risk of her receiving injury by that second resting on the rock.

Eighth Point.

The rule applicable here is laid down in many authorities.

"If the plaintiff sees or by ordinary care could see, that the defendant has in fact negligently exposed him to the risk of injury, he can no longer rely on the presumption that the defendant has acted with due care, *and must use all the additional precautions on his own part, which a person of ordinary prudence would use in view of the circumstances as they are and not as they ought to be.*"

Shearman & R. on Neg., § 92.

That rule is exactly applicable to the present case. The libellants charge that the owner of the wharf was negligent in not having procured water enough in the berth to enable this vessel to lie afloat drawing 14½ feet of water.

But the master knew Saturday afternoon, that there was not water enough in the berth to allow his vessel to lie afloat drawing 12 feet 10 inches forward and 11 feet aft. Then he could not longer rely on the defendants' care. He was bound to take the

very obvious precaution of moving his vessel away from the berth at the first opportunity.

And the authorities cited by the Court below are not inconsistent with this.

In the cases of *Sawyer v. Oakman*, 1 Lowell, 134 ; *The Pennsylvania R. R. Co. v. Atha*, 22 Fed. Rep., 920 ; *Leonard v. Decker*, 22 Fed. Rep., 741 ; *O'Rourke v. Peck*, 40 Fed. Rep., 907 ; *The Annie R. Lewis*, 50 Fed. Rep., 556 ; *Barber v. Abendroth*, 102 N. Y., 406, and *Carleton v. Franc I. & S. Co.*, 99 Mass., 219, it is expressly found that the master of the vessel was ignorant of the danger in the berth *until the vessel had received the injury*. In the case of *Christian v. Van Tassel*, 12 Fed. Rep., 884, and *The Union Ice Co. v. Crowell*, 55 Fed. Rep., 87, the master being shown to have had knowledge of the obstruction, the vessel was held in fault for his negligence in allowing his vessel to come on the obstruction.

And an exactly parallel case to this is the case of *Peterson v. The Great Neck Dock Company*, 75 Fed. Rep., p. 683. In that case the vessel was a canal boat which came alongside a wharf to discharge. On one side of the wharf stones had fallen out, which were under the water. The canal boat, as the tide fell, got caught on them, but came off from them on the rising tide, without injury. The next morning she came to the same berth and remained discharging until at low tide she got on the stones again, and was considerably injured. The Court held that, as the master had been on those rocks without injury in that same berth and as, if he had hauled his boat out of the berth before the tide, he would have received no injury, the cause of the accident was "his own negligence in assuming that the tide would rise on the 7th as it did on the 6th." And the Court says : "He was not justified in so assuming, and his acting on this assumption and failing to haul the boat before the tide fell, was the negligence which caused the damage. The master had a right to assume that the berth was clear of stones ; but the proof is

that he not only examined the bottom himself, but had been notified of the existence of stones there, and he had actually been on some of them the day before. Knowing this he had no right to assume that the dock was clear. In fact he did not act on any such assumption, because he knew to the contrary. What he did assume was that the tide would rise as high on the 7th as it did on the 6th. This he had no right to assume. His duty was to watch the tide, and to haul his boat in time to prevent his boat from catching on the stones which he knew to be there. His failure to watch the tide and to move his boat when he saw it was falling, was negligence, and the negligence which caused the accident." And the libel against the wharfinger was dismissed.

Another exactly similar case is the case of *Washington v. The Staten Island &c. Co.*, (68 Hun 87), in which the owner of a canal boat knowing, that his boat came on the bottom of the berth at low tide, did not remove her. The New York Appellate Division decided against him, saying "no case can be found, where after the master of the boat has learned of the defect and still persists in imperilling his boat by the use of the dock, he has a right to recover the voluntary injury sustained after he knew of the imperfection."

See also the case of *Nelson v. The Phoenix China Works*, 7 Ben. R. 37.

Ninth Point.

The reason of the rule is obvious. The proximate cause of the loss here was not the mere presence of the rock. If the vessel had been injured the first time she touched bottom, the case would be different. But the cause of the vessel's being injured *at the second time* was the Master's negligence in not removing her from a danger whose presence he knew.

"If plaintiff having full knowledge of the existence of the defect in the machinery complained of nevertheless continued to use the machinery until the happening of the accident, the defendant is not chargeable with the consequences resulting therefrom.

Odell v. N. Y. C. and Co., 120 N. Y.,
325.

Similar questions have often come before the Courts in collision cases and the same rule has always been laid down.

"A. can recover nothing, though B. was guilty of negligence contributing to the collision, *if A, by ordinary care exerted up to the moment of the collision, could have avoided it.*"

Marsden on Collisions (3 Ed., p. 23).

"An antecedent act of negligence is remote when notwithstanding it, the other vessel, by the exercise of ordinary care, can avoid a collision."

The Portia, 64 F. R., 811.

"Ordinarily an act though negligent is not the proximate cause of an injury when, but for the intervening negligence of another, the injury would not have been inflicted."

The Garden City, 67 F. R., 368.

Tenth Point.

And finally, to sum up all, even if we were to concede the existence of the rock, as the libellants claim it; even if we were to concede the representation as to the depth of water which the libellants allege, still in face of the following undisputed facts: (1st) That the master was instructed to sound for himself from time to time; (2d) that both he and the mate did sound from time to time; (3d) that on Friday

afternoon both the master and mate learned by their own soundings that there was not as great a depth of water in the berth as they claim to have been told that there was, and that the vessel would touch bottom at low tide, and that the bottom was uneven, having an inequality of two and a half to three feet under the vessel ; (4th) that on Saturday afternoon the vessel with 300 tons of cargo in her aft and only 100 tons forward was down by the head about two feet, drawing only 12 feet 10 inches forward and about 11 feet aft, and therefore was resting on something under her which lifted her stern two feet ; (5th) that the vessel, however, did not at that tide receive any injury ; (6th) that the tide had a rise of three to three and a half feet ; (7th) that the master did not move his vessel at any part of the following high tide, but allowed her to come down a second time on the obstruction which had thus lifted her stern at the previous low tide, as a result of which she was injured—in view of these facts one of two things must be held, viz, either that there was no negligence in the master's allowing his vessel to come a second time on a rock, although its existence there is claimed to prove negligence on the part of the wharf owner, or else that the decree in this case is wrong and must be reversed.

A writer discussing this question has very well said :

“ The Party who last has a clear opportunity of avoiding the accident notwithstanding the negligence of his opponent, is considered solely responsible for it.”

Quarterly Law Review, Vol. 11, p. 507
(1886).

And there can be no dispute that the master of the Tobin was the last who “ had a clear opportunity of avoiding this accident.” He chose to go to sleep instead of availing himself of the opportunity, and the libellants therefore are to be “ considered solely responsible for it.”

Eleventh Point.

The decree below should be reversed and the libel in favor of the owners of the Tobin should be dismissed, with costs.

The decree dismissing the libel against the owners of the vessel should also be reversed and the cause remanded for further proceedings.

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NATHANIEL WILSON,
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Advocates.

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
Charles Edwards and Charles G. Edwards, Jr., Appellants.

Charles Edwards, acting as the own bond,
Charles Edwards and Charles G. Edwards, Jr., et al.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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ROBERT D. BENEDICT,
of Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

CHARLES G. SMITH and CHARLES G.
SMITH, Junior, Appellants,

vs.

CHARLES BURNETT, suing on his own
behalf, CHARLES BURNETT and
CHARLES G. ENDICOTT, etc., *et al.*

No. 112.

**Appeal from the Court of Appeals of the District
of Columbia.**

Supplemental Brief for Appellants.

First.

It is claimed in behalf of the appellees that, there having been no findings of fact by the Court of Appeals, this Court can not consider or inquire into the facts, but has only to determine whether upon the record there is error. This claim is based upon the idea that appeals from the Court of Appeals of the District of Columbia are governed by the provision in the Act of February 16, 1875, as to appeals from the Circuit Court of the United States to the Supreme Court.

We think this claim is clearly without foundation.

Section 705 of the Revised Statutes provided that judgments and decrees of the Supreme Court of the District of Columbia might be reviewed "in the same manner and under the same regulations as are provided in cases of writs of error on *judgments or appeals from decrees in a Circuit Court.*"

And the eighth section of the Act of February 9, 1893 (27 Stats. at L., 434), which established the Court of Appeals of the District of Columbia, provided for a review of its judgments and decrees "in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia."

The question therefore is this, What was the manner and what were the regulations which at the time of the passage of that act had been provided for "*appeals from decrees in a Circuit Court of the United States?*"

Those appeals were not at that time (February 9, 1893) provided for or regulated by the Act of February 16, 1875. They were provided for by the Act of March 3, 1891, which established the Circuit Courts of Appeals.

By that statute it was provided (section 6) that—

"the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court and *the existing Circuit Courts* in all cases other than those provided for by the preceding section of this act."

The preceding section does not refer to such cases as the present.

It is the practice, therefore, as to the review of a decree of the Circuit Court by the Circuit Court of Appeals which was, by section 8 of the Act of February 9, 1893, provided to be the practice on a review of the decree of the Court of Appeals of the District of Columbia.

It needs no citation of authorities to show that no findings of fact were required on appeals from decrees of the Circuit Court to the Circuit Court of Appeals. Many, if not all of the Circuit Courts of the United States, at the time of the passage of the act creating the Circuit Courts of Appeals of the United States, had admiralty cases before them undecided, which were afterwards decided, and then appealed to the Circuit Court of Appeals. In the Second Circuit there were twenty-four such cases so appealed and disposed of. They are all reported in the first volume of the United States Appeals. No findings of fact were required in any of those cases in order to their being reviewed by the Circuit Court of Appeals. And in all those cases the Circuit Court of Appeals held that the whole case was open for them upon the facts, as well as the law.

The question was brought up before the Circuit Court of Appeals at once, in the case of *The Havilah* (1 U. S. Appeals, p. 1), and was so expressly decided; and the same decision was made in the First Circuit, *The Philadelphia* (60 Fed. Rep., 243), and in the Ninth Circuit, *The State of California* (49 Fed. Rep., 174).

When the Revised Statutes were passed, the only appeal from a decree of the Circuit Court in Admiralty was to the Supreme Court of the United States. Any statute providing for that appeal was of course required

to be followed in respect to appeals from the Supreme Court of the District of Columbia. The practice on such appeal was undoubtedly governed by the Act of 1875, until the passage of the Act of March 3, 1891. But that act, establishing the Circuit Courts of Appeals, provided for a different appeal from decrees of the Circuit Courts, and a different manner and different regulations of reviewing on that appeal the decrees of the Circuit Courts.

Thereafter, appeals from decrees of the Supreme Court of the District of Columbia were required to be taken as appeals from decrees of a Circuit Court to the Circuit Court of Appeals were required to be taken. And when the Act of February 9, 1893, was passed to establish the Court of Appeals of the District of Columbia, it was the practice on appeals from a Circuit Court to the Circuit Court of Appeals which was made applicable to appeals from its decrees to the Supreme Court of the United States.

The appeal in this case conforms to that practice. And the power of this court to consider the case must be the same as was the power of the Circuit Courts of Appeals to review decrees of the Circuit Courts of the United States in admiralty which were brought before them by appeal, viz., to review the whole case, which is the true function and meaning of an "appeal."

Second.

(a) The appellees' brief seems to be based on the idea that it is important to allege and claim that the captain was advised "to sound *around* the vessel" (Brief, p. 34),

and that the wharf owners intended "to give the impression that the only precaution he needed to take was to sound *around* his vessel." (Brief, p. 35.)

There are three suggestions which we wish to make in answer.

1. This is not a fair statement of the evidence.

When Hankins was first examined he said (fol. 72), "Mr. Smith told me he would like me to *make some soundings* for myself." The words "around my vessel" do not appear.

On cross-examination, when asked to give Mr. Smith's exact words, he said (fol. 85): "He says * * * but I would like you to *make some soundings* for yourself."

Again the words "around my vessel" are absent.

Again, at (fol. 122), he said, "He told me he would like me to *make some soundings* around for myself." Here it is "soundings around," and not "around my vessel."

Then Lee was called, and testified (fol. 129), "Mr. Smith said to him, I want you to *make some soundings for yourself*, and our superintendent will help you to place the vessel." And again (fol. 138), "He asked the captain to *sound for himself*."

Then Smith testified (fol. 516), "I told him I did not know just what the bottom was, but that I *would advise him to make his soundings there*, and to find out from time to time just how his vessel was laying, and that I would see he had any assistance he wished in moving the vessel forward or aft or shoving her out."

And on cross-examination (fol. 567), "I told *him* to *sound*."

Then Hankins was recalled, and says: "Mr. Smith told me he would like (*me*) to *make some soundings*." And then in answer to the direct question by his counsel, "Where did he say to sound?" he answers, "Around the vessel," which is the first and only time that any such expression was spoken of.

Three times Hankins had said that Smith said he wanted him to make soundings. Lee, this libellants' witness, had said the same thing, and Smith had confirmed them both.

Hankins' last different statement as to the language used is not to be taken. It is certainly not of weight enough to justify putting the word "around" into italics, and claiming that it was intended that the captain should understand that he need take no precaution as to the depth of the water under his vessel. It was only the depth of water under his vessel that was of the slightest consequence. It was only in reference to the depth of water under his vessel from time to time, that Smith told him to make soundings.

2. This conversation was on Friday morning. The vessel was not moved till Friday afternoon.

If it were to be taken, as the appellants' brief says, "that what Mr. Smith advised the captain to do was to sound *around* the vessel as she lay at that time," it is beyond dispute that the captain did not sound around her "as she lay *at that time*." He directed the mate to

sound if he hauled the vessel when the captain was not there. (Fol. 72.)

But the mate did not. He hauled the vessel that Friday afternoon, and then sounded. (Twilford, fol. 236.)

3. It is plain that the force to be fairly given to the language of Mr. Smith to the captain, was that he notified the captain that he must not rely upon any certain depth of water under his vessel, or any certain kind of bottom for himself, and must rely on the information which he should obtain for himself on these points.

(b) The appellees' brief seeks to convey the idea that, at the conversation on Saturday afternoon, the captain did not know how much stone was in the vessel, and where it had been put. (Brief, pp. 55, 56.)

Apparently Hankins' evidence was overlooked where he says, in answer to the question as to how many tons of stone he had aboard on Friday night: "All I could tell was *what they told me at the stone-crusher on the wharf. They said they had near*"—and here he was stopped, and did not testify to what was told him.

But this proves that on Friday night he was told how much stone had been put in. And he knew just how long the stone had been going in at the after hatch, and how long at the forward hatch. And even the appellees' brief concedes that the master "had the impression" (Brief, p. 47), "that more cargo had been put in aft than forward," and that the master did "attribute the vessel's being by the head to her touching the ground."

(c) But the brief then proceeds to claim that the master communicated to Mr. Speaker the fact that the vessel *was down by the head*, and his idea that she was touching.

This is an error. It is plain that all that the captain communicated to Mr. Speaker was his apprehension that she was touching, and not at all the fact that she was down by the head. So that Speaker's idea was that the captain thought she was touching *forward*, whereas her being down by the head had showed to the captain that she was on something not *forward*, but *aft*.

This is plain by Speaker's answer, as Hankins gives it. He says: "I asked Speaker if she was not on something. I thought she seemed to tip too much. He told me no, that she was on nothing." He says, "*Forward of the piling, that fourth piling*, where it had been dug out, you won't touch her, if you are full loaded, with the lowest tides." (Fol. 73.)

Plainly, Speaker was speaking of the depth of water forward, not aft. And he must have understood the master therefore as thinking that the vessel was touching *forward*, not *aft*.

And forward, as the master found by his soundings, there was in fact 16 or 17 feet of water. (Fol. 73.)

This demonstrates that the captain did not tell Speaker that she was down by the head.

(d) The brief is in error in saying that Speaker "admits that the captain called his attention to *her being down by the head*." (Brief, p. 48.) Speaker's evidence is—

"Did you not say that he was tipping by the

head?—A. No, sir; I did not say he was tipping by the head. I did not see it until the captain called my attention to it, and *I ain't seen it yet*—that she was ever tipping by the head.

“Q. The captain did call your attention to it?—

A. *He called my attention*—he said he thought she was ebbing out.”

The fair meaning of this evidence is that the captain spoke to Speaker about her tipping (not about her being down by the head), which he thought was due to her touching something. And that Speaker, understanding that the captain thought she was touching *forward*, answered as to the depth of water *forward*, as showing that she could not be touching *forward*.

But the master knew by the marks on the schooner that she was down by the head, which Speaker did not know. And he knew therefore that she was on something aft, which held up her stern.

No sounding around the vessel could affect that fact.

(e) The appellees' brief (p. 55) speaks of the master's "judgment as to the effect of the cargo put on board in making her tip forward." But the master did not have a judgment that this tipping was due to "the effect of the cargo," based on "a rough estimate of the relative amounts put in forward and aft."

His judgment, both then and when he was examined, was that she tipped *because she touched the bottom*. (Fol. 96.)

(f) Appellee's brief (p. 55) says that the captain "*had no reason to suppose that there was any obstruction under*

the vessel of which he was not informed." But he had conclusive reason for supposing not merely, but *knowing* that there was an obstruction under his vessel, *of which he was informed* as soon as he saw by the marks on his vessel that she was two feet down by the head.

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